No. 82-177

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE Arkansas Trial Lawyers Association, Alabama Criminal Defense Lawyers Association, North Carolina Academy of Trial Lawyers, and Tennessee Association of Criminal Defense Lawyers

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

MISCELLANEOUS:

INTEREST OF THE AMICI CURIAE

The four amici curiae joining in this brief are the Arkansas Trial Lawyers Association, the Alabama Criminal Defense Lawyers Association, the North Carolina Academy of Trial Lawyers, and the Tennessee Association of Criminal Defense Lawyers. The amici have obtained letters of consent from both sides in this case to file this brief, and the letters are being filed with this brief.

The amici are voluntary associations of trial lawyers in their states. These four groups of trial lawyers each are organized to promote the proper administration of justice and to defend the principles of the United States Constitution. The amici believe that a good faith exception to the Fourth Amendment exclusionary rule, even if acceptable in principle, has its limits, and this case presents a situation where the good faith exception should not be extended.

The amici believe that the Fourth Amendment exclusionary rule is a scapegoat for unfounded claims that it seriously contributes to the crime rate when, in reality, the Fourth Amendment

exclusionary rule is actually invoked in only about 1% of all criminal cases. The government's argument in favor of the good faith exception in this case is simplistic and ignores the realities of the warrant process in America. More fundamentally, however, the government seeks to subvert a core value of the Fourth Amendment: the need for probable cause.

The ramifications of the government's argument go far beyond its expressed purpose of criminal accountability, as laudable as that is. The government's good faith exception will further promote Fourth Amendment violations, and all citizens will be subject to such violations without the government being properly accountable. This issue involves the rights of all Americans, not just the so-called "criminal element" whose cases usually adjudicate Fourth Amendment rights.

For these reasons, amici stand foresquare against the government's effort to undermine the Fourth Amendment by seeking to extend the good faith exception in this case.

A R G U M E N T

THE GOVERNMENT'S PROPOSED GOOD FAITH EXCEPTION TO THE PROBABLE CAUSE REQUIREMENT IS UNCONSTITUTIONAL AND SHOULD BE REJECTED.

A. Introduction.

The Fourth Amendment is clear and unremitting in its requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This case involves an issue that cuts to the heart of the Fourth Amendment: whether the core value of the probable cause requirement is subject to the good faith exception the government seeks to have the Court adopt.

Amici submit that the government has framed the question presented for review erroneously. To show the issue in its starkest terms, amici submit the issue should read:

> Whether the Fourth Amendment exclusionary rule should be modified to permit

searches under a search warrant erroneously issued at the request of the officers but without probable cause where the officers reasonably relied on the invalid warrant they procured.

This is the issue actually presented for review under the facts of this case. The government's argument is a full scale attack on the exclusionary rule which obscures the fact the government actually is requesting the Court sanction searches without probable cause but with only a good faith belief that probable cause exists.

In considering the government's argument in this case, it is appropriate to start from Justice Frankfurter's admonition in United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):

> It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in Boyd v. United States . . ., in Weeks v. United States . . ., in Silverthorne Lumber Co. v. United States . . ., in Gouled v. United States . . ., or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether

one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

B. The officers' failure to recognize they lacked probable cause for the search warrant they procured cannot legitimize the search conducted under the warrant when it is later determined that they lacked probable cause for the issuance of the warrant. The officers are not blameless on the failure of probable cause.

The government initially argues that the cost-benefit analysis of deterrence should be the basis for applying the exclusionary rule. Then, the government subsumes this premise as a part of its argument that the officers here could not be deterred from a Fourth Amendment violation where they conducted a lengthy [albeit incomplete] investigation, they detailed the facts and circumstances which they believed showed probable cause, they consulted with assistant district attorneys on whether there was probable cause, and they presented their affidavit to a state superior court judge who issued the search

warrant. The government argues "that no credible justification has ever been advanced for invoking the exclusionary rule when, as in Leon and Sheppard, the police have not engaged in any misconduct whatsoever, but a judicial officer has issued a search warrant that is subsequently held to be defective." (Govt's Brief at 57)

The efforts of the officers here are to be commended to some degree; they did everything they could to assure themselves that they were acting properly, but their pre-warrant investigation did not go far enough. The magistrate issued the warrant at their request. The fatal problem is that they acted too soon before the investigation was complete and there was no probable cause for the search they wanted to undertake. Here, the government shifts all the constitutional blame to the magistrate. The fallacy of this contention is exposed by considering the role of the magistrate in the issuance of search warrants.

Magistrates do not operate in a vacuum; nor do they collect and evaluate probable cause for issuance of a warrant on their own directed to a disinterested police officer to serve. Magistrates

are required to be "neutral and detached" under the Fourth Amendment. See, e.g., Johnson v. United States, 333 U.S. 10, 13 (1932); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); United States v. United States District Court, 407 U.S. 297, 316 (1972). The police "officer engaged in the often competitive enterprise of ferreting out crime"; Johnson, supra, at 13; investigates and collects his evidence. When he thinks he has probable cause, he may present that evidence to a magistrate for evaluation and issuance of a search warrant if one is desired. The timing of the issuance of the warrant is important--if the officer gets a warrant prematurely before probable cause is developed, the entire case may be compromised. (Note the analogy to premature indictment and the speedy trial requirements compromising a criminal case which should not have yet been filed.) When the officer presents his information to the magistrate, the judicial process is finally invoked. The magistrate reviews the facts and circumstances submitted and decides whether or not the requested warrant should issue.

Some of the realities of the warrant process should be noted at this juncture: First, the officer usually prepares his own affidavit and warrant which he then takes to the judicial officer. Sometimes, a prosecutor will be asked to assist in preparation of the affidavit and warrant in more complicated cases. Then, the magistrate reads the affidavit to evaluate probable cause. Where local law permits it, the affidavit may be supplemented by testimony if needed. Usually, but without asking a question, however, the magistrate signs the warrant prepared by the officer, and the search is underway. Quite seldom, if ever, do individual magistrates actually turn down a search warrant request. A conscientious, well-trained, and independent federal magistrate may actually do that on occasion, but amici submit that the number of search warrant requests actually turned down by state and federal magistrates is far less than 1% of all presentations made. The fact magistrates usually defer to the police in practice is evident in the fact that warrants are often struck down after the fact for lack of probable cause by suppression judges, just as in this case.

C. "Two wrongs do not make a right."

It is thus an intellectual fallacy to argue as the government does that the magistrate was the only one who erred in issuing the warrant, which the government now admits was defective because probable cause was lacking after losing on that issue in the district court and the Ninth Circuit, and that the police are totally blameless in this investigatory adventure. The police here collected the facts and circumstances for quite some time, but they erroneously believed that they had probable cause. Being somewhat unsure of their probable cause, they asked some assistant district attorneys, advocates who are also intimately involved "in the often competitive enterprise of ferreting out crime," for assistance, and the the prosecutors also erred in the assessment of probable cause. The magistrate merely acted on the search warrant application and issued the warrant.

The government in essence is arguing here that the act of the magistrate is determinative on the question of probable cause. It argues that if the magistrate errs on the assessment of

probable cause, all the government need show is that the officers acted in good faith on the warrant which they presented which lacked probable cause. Thus, the government really argues that "two wrongs make a right," and the magistrate's same error mystically cures their error and allows a search without probable cause to go forward and the proceeds into evidence in a criminal trial. (Govt's brief at 58-61)

Then, there would no longer be any need for a suppression hearing because good faith was established by the magistrate, and judicial review is foreclosed.

D. <u>There can be no "good faith exception to the probable cause requirement" under the Fourth Amendment.</u>

What the government seeks in this case is not merely a "good faith exception" to the exclusionary rule or the Court's refusal to extend the exclusionary rule to this type of conduct. What the government seeks transcends the issues it argues and amounts to a request that the Court adopt a "good faith exception to the probable cause requirement."

This is a dangerous concept which must be flatly rejected by this Court. This is no small encroachment on a protected liberty--it would cut the heart out of the probable cause requirement of the Fourth Amendment.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, supra, 407 U.S. at 313; Payton v. New York, 445 U.S. 573, 585 (1980). A search of a dwelling must be based upon probable cause and a warrant or bona fide exigent circumstances to dispense with a warrant. Id. (Here, there is no issue of exigent circumstances.)

An entry which is based on a fundamental error of law as to the existence of probable cause, no matter what the good faith of the officer and magistrate, is nonetheless a violation of the Fourth Amendment. A good faith mistake as to the facts which yields probable cause is one thing; a good faith mistake as to whether the known facts add up to probable cause is quite another. If the issue in suppression hearings becomes not whether the officer actually

had probable cause but whether he could objectively rely on a magistrate's erroneous determination of probable cause made at his own request, there no longer will be any need to evaluate probable cause after the fact in any case. Today's ultimate search and seizure question, the question of probable cause, will be replaced by an inquiry into whether the officer could objectively believe he had probable cause. The Fourth Amendment will atrophy as a constitutional protection because the existence of probable cause would be purely an academic question which would no longer need resolution on any given set of facts.

This Court has, on recent occasion, sought to implement "bright line" rules for officers to follow. See, e.g., New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, 456 U.S. 798 (1982). The government's proposed good faith exception would end any need to rely on specific rules. Instead, nebulous and undefinable concepts of "reasonableness" and "good faith" would take their place. Without any need to follow rules, no officer would not be acting in "good faith" in the future, and the "good faith

exception" would be a self-fulfilling prophecy in every case from now on. Then, it would no longer be an exception--it would be the rule.

E. This proposed good faith exception will promote police disrespect for the core values of the Fourth Amendment.

This broad proposed good faith exception to the probable cause requirement will promote further police disrespect for the core values of the Fourth Amendment.

The courts are the only institution to protect us from police abuse of Fourth Amendment rights. Since the "judicial integrity" rationale for evidentiary exclusion lost its viability, the police read any judicial use of illegally seized evidence as condoning the illegality which brought it before the bar. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U. Pitt. L. Rev. 307, 354-59 (1982). What is the goal of "the often competitive enterprise of ferreting out crime"? Securing convictions, of course. When evidence cannot be used because it was illegally obtained, any officer remotely

attempting to do a professional job will obviously do better the next time and not act illegally unless he is corrupt or stupid. When the courts are, however, unwilling to reject illegally seized evidence because of a desire to convict the guilty and no longer balance rights, the officer will see that his illegal act has been condoned by the courts. The police will then "'push to the limit' any authority they are given by the courts." Id. at 359 n. 285 quoting Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

No American right is already subject to more governmental abuse than the Fourth Amendment right to be free from unreasonable searches and seizures. The government implies here it cannot make its officers comply with the Fourth Amendment often enough, so it should no longer be accountable when they do not. In reality, the Fourth Amendment is violated in every jurisdiction every day. As a limit on governmental power, the Fourth Amendment has a vital role in our constitutional freedoms. The government's failure to follow the law cannot be an excuse to overlook the law when the question is something

as fundamental as "The right of the people to be secure . . . against unreasonable searches and seizures . . . ."

F. The government's arguments that the exclusionary rule subverts the truth-finding function and promotes disrespect for the law defy logic.

There still is such a thing as government accountability, and the government here sweeps that issue under the constitutional rug and never addresses it. Government accountability is why the Framers gave this nation a Bill of Rights--it is a final check on government power. Now the government wants this Court to take that away from us in the name of "crime control" and criminal accountability by arguing that the exclusionary rule contributes to crime and disrespect for the law even though the government must concede that the exclusionary rule is successfully invoked in only a small percentage of cases. (Govt's Brief at 70-74)

The Fourth Amendment was intended to protect all citizens, both the law-abiding and the lawless, from unjustified governmental intrusions. See, e.g., Weeks v. United States, 232

U.S. 383, 395 (1914); Agnello v. United States, 269 U.S. 20, 32 (1925); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Miller v. United States, 357 U.S. 301, 314 (1958); Ker v. California, 374 U.S. 23, 33 (1963).

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, supra, at 69 (Frankfurter, J., dissenting). But, the rights at issue here are the rights of all the people--not just the respondents. The government would love to convict the respondents, but at what expense?

The government argues that the exclusionary subverts the truth-finding function of the courts. But, so does the entire law of privileges, and the "sole warrant [of a privilege] is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the

administration of justice." McCormick on Evidence § 72, at 152 (2d ed. 1972). Surely the maintenance of a constitutional freedom is worth something. Some things are more important than finding the truth in a criminal trial. A free society is one of them.

The exclusionary rule may free some guilty people, but so does the presumption of innocence and the government's burden of proof beyond a reasonable doubt. Guilt, however, is a question for juries, not appellate courts and not prosecutors. Where does Blackstone's admonition that "better a guilty man go free than an innocent man be convicted"[1] fit in to American law now?

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1. Actually, Blackstone said: "[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 4 Blackstone, Commentaries *352.

Also, Blackstone would have approved of the exclusionary rule had it been around in his time. See 1 Blackstone, Commentaries *244-45:

"For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of

The exclusionary rule may benefit the guilty, but the Fourth Amendment benefits us all. The government's zeal to eviscerate the exclusionary rule in the name of crime control is foresaking a fundamental freedom which it will incidentally turn into a "form of words"; Mapp v. Ohio, 367 U.S. 643, 655 (1961); as the Court warned against seventy years ago in Weeks v. United States, 232 U.S. 383, 394-95 (1914):

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their of-

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(note 1, cont.) that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies." (emphasis in original).

ficials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . In Adams v. New York, 192 U.S. 585, this court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd Case, 116 U.S. 616. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

G. In Conclusion.

As Circuit Judge Richard Sheppard Arnold wrote in Williams v. Nix, 700 F.2d 1164, 1174 (8th Cir. 1983), cert. granted 103 S.Ct. 2427, a Sixth Amendment good faith case:

> It will inevitably be remarked that our opinion focusses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A

> system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

Just how much depredation of the Fourth Amendment will this Court permit before it stops this encrochment on our cherished liberties in the name of "crime control"? This case presents a proper occasion to draw a line.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed and the government's proposed extension of the good faith exception should be rejected.

Respectfully submitted,

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